Supreme Court, U. S.
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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1979

No. 78-1759

JOAN E. HELM, individually and as Guardian ad Litem for DAVID WILLIAM QUEDENS, an Incapacitated Person,

Petitioner,

vs.

PACIFIC POWER AND LIGHT CO., a Maine corporation, MOBILE AERIAL TOWERS, INC., an Indiana corporation and THE IDAHO FIRST NATIONAL BANK, a National Association,

Respondents.

RESPONSE TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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INDEX

	Page
Questions Presented	1
Statement of the Case	1
Reasons for Denying Petition	4
Conclusion	6

CASES CITED

	Page
Carr v. Wallace Printing Co. 170 Pac. 107 (Idaho 1918)	5
Otts v. Brough 409 P.2d 95 Idaho (1965)	5
Ramon v. Interstate Utility Company 170 Pac. 83 (Idaho 1917)	5

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Respondent, The Idaho First National Bank, a national association, respectfully urges this Court to deny the Petition for Writ of Certiorari.

QUESTION PRESENTED

Whether, as respects the Idaho First National Bank, any reason whatsoever exists for the United States Supreme Court to review the decision of the United States Court of Appeals for the Ninth Circuit.

STATEMENT OF THE CASE

On July 13, 1973, David Quedens, represented herein by his mother and guardian ad litum, the petitioner Joan E. Helm, was severely injured when he simultaneously touched uninsulated high voltage power wires while performing tree-trimming work. At the time and place of the accident, David Quedens was employed by Davey Tree Expert Company (Davey Tree) and was

performing work pursuant to a contract between Davey Tree and the Idaho First National Bank (the bank). The contract called for Davey Tree to trim trees on and adjacent to a vacant lot on which the bank was to construct a new branch office. (R. 398,414)

Quedens had been employed previously by Davey Tree between May and September, 1971, as a tree trimmer, and also had prior experience as a tree trimmer in California. (R.96:19) During his employment with Davey Tree in 1971, Quedens was a member of a tree trimming crew whose exclusive function was to trim trees along utility power lines. Weekly safety meetings for the benefit of the crew members were conducted and it was stressed in these meetings that the mobile boom and bucket used in the work should never be positioned closer than 6 feet from any power lines. (R 597-99) After two years of service in the military, Mr. Quedens returned to Davey Tree in March, 1973 and worked as a foreman.

The agreement between the bank and Davey Tree was in the form of an acceptance of a bid submitted by Davey Tree. The bid was prepared by Mr. James Marria, then a sales representative for Davey Tree, in the latter part of June, 1973. In order to bid the job, Mr. Marria and Mr. Quedens traveled to Sandpoint, Idaho to view the site. Quedens' attention was called specifically to the three power lines over and above the trees to be trimmed and he was reminded not to get the boom and bucket closer than 6 feet to the power lines. (R 597-99)

Much of the trimming was to be done from a bucket which was at the end of a hydraulically extended mobile tower unit mounted on a truck and manufactured by Mobile Aerial Towers, Inc. Several decals warning of the dangers of high voltage power lines were conspicuously located on the boom assembly and inside the cab of the truck used by Queden at the time of the accident. (Marria depo. 44,45:15-25, 83:21, Exhibit 6). These warnings were easily observable at the time of the accident. (Sharp depo. 93:23-25)

The trees being trimmed were not on the bank's property. They were located adjacent to the property between the sidewalk which bordered the vacant lot and the public street. The bank's property line ran to the inside of the sidewalk. (R. 353) The trees were to be trimmed pursuant to the bank's request and the agreement, but the bank was under no legal obligation to do so, as the City of Sandpoint had exclusive control over the trees located outside private property lines. (R. 353)

On the day of the accident, Quedens was trimming trees from the bucket. The bucket had controls to operate the boom. There was also a control panel in the truck to lower the boom in case of emergency. Quedens had trimmed two sides of the trees from the inside and had then moved the truck to the adjoining street, approximately 15 feet from the tree he was about to trim. (Sharpe depo. 56:9, 59;13,101)

The power lines in question were owned, operated and maintained by Pacific Power and Light Co. A three wire set ran north and south above the trees being trimmed. Another three wire set, called a tap line, ran perpedicularly across the street from a cafe and intersected the line running north and south. The height of the tap line was 39 feet above street level. (R.415-17) Neither the three wire set nor the tap line served bank property. The lines were not over the bank's property, nor did the bank have any control over them. (R. 418, 464:29)

Late in the afternoon, following an exchange of tools between the two men, Quedens positioned the bucket over the street to the rear of the truck. (Boyle depo. 9:15, 12:11) Quedens then raised the boom to a height which resulted in the bucket being positioned approximately 1 foot below and between two wires of the three wire tap line. The wires passed on both sides of Queden at approximately the level of his waist. (Sharp depo. 63:6, Boyle Depo. 23:22-24:3) Quedens raised his hands and arms above the wires and appeared to be shouting or talking to Sharp on the ground. Quedens was looking right down the wires when he yelled at his partner and must have seen them. (See footnote 1 to the Order Denying Petition for Rehearing, Appendix D.) Quedens then suddenly dropped his arms to both sides and both hands touched the wires, resulting in the injuries sustained. At the time of the contact the bucket was positioned over the street and 15-20 feet away from the closest limb. (Boyle depo. pages 66-67); Sharp depo. page 59:22-24) The photographic exhibits admitted at the hearing on the summary judgment motions clearly depict that the power lines ran some distance above the tops of the trees.

Petitioner brought suit against defendants Pacific Power and Light Co., Mobile Aerial Towers, Inc. and the Idaho First National Bank in the United States District Court for the District of Idaho. Upon motions by the defendants for summary judgment, oral argument was presented to the District Court. After careful consideration, the District Court granted the motions and entered judgment for all defendants. The petitioner

filed a notice of appeal to the United States Court of Appeals for the Ninth Circuit and also filed a Federal Rules of Civil Procedure 60(B) motion to the District Court, which was denied. On November 30, 1978, the United States Court of Appeals for the Ninth Circuit entered its memorandum opinion affirming the District Court's judgment in all respects. Petitioner filed a petition for rehearing on January 8, 1979, and on February 26, 1979, the United States Court of Appeals for the Ninth Circuit denied the petition. The Court of Appeals Memorandum Decision and its Order Denying the Petition for Rehearing have been set forth in the Appendix to the Petition for Writ of Certiorari.

REASONS FOR DENYING PETITION

Petitioner has not set forth any reason whatsoever which could be seaid to be sufficient grounds for this court to issue its Writ of Certiorari to review the decision of the Ninth Circuit Court of Appeals. Instead, petitioner has chosen to engage in nothing more than jury rhetoric in an effort to sway this Court to issue its discretionary writ. Both the District Court and the Court of Appeals twice reviewed the record in response to Petitioner's argument that a question of material fact exists and neither court found any such issue. Petitioner's effort to now disguise her argument that a material question of fact does exist in terms of a denial of the right to a jury trial is nothing more than begging the question. Obviously, in civil cases, the right to jury trial is conditioned upon there being a material factual question to submit to the jury. No such question exists in this record.

Petitioner has not argued that the decision of the Ninth Circuit Court of Appeals is in conflict with the decision of another court of appeals on the same matter. Obviously, she cannot. As respects the Bank, petitioner does not argue that the United States Court of Appeals for the Ninth Circuit decided a state law question in conflict with applicable Idaho law. Again, she cannot. Incredibly, petitioner now chooses to label the decision of the District Court and the decision of the Court of Appeals as a mockery of justice. In its order denying the petition for rehearing, the United States Court of Appeals of the Ninth Circuit made a special effort to point out the petitioner's misstatements of the record and of the Courts November 30, 1978, opinion contained in her petition for rehearing. Petitioner again sets forth the same misstatements in her petition filed with this Court; the highest court of the United States. If there is any mockery of justice, the

bank would suggest that it is not by the District Court, the Court of Appeals or by the respondents, but by the petitioner.

As against the bank, petitioner argues that the District Court and Court of Appeals should have applied Sections 416 and 427 of the restatement (Second) of Torts. Both lower courts rightly rejected this argument. The referenced sections are inapposite to the instant action as there is no allegation or proof that the independent contractor, Davey Tree, was negligent. In order for those sections to apply there must be a showing that the independent contractor failed to exercise due care for which the employer of the independent contractor may be held vicariously liable. Petitioner does not, and cannot, site any Idaho Case Law which adopts the theory of these sections. Obviously, therefore, petitioner cannot argue that the District Court or the Court of Appeals failed to correctly apply Idaho law.

Furthermore, the few cases from other jurisdictions which have applied those sections, such as the case sited by petitioner, all involve situations where the employer of the independent contractor exercised some control over the area where the accident or injury occurred. Here, the bank did not own, maintain or control the power lines and the accident occurred in the public street.

Idaho law does provide that an independent contractor and his employees are invitees upon the owner-employer's premises. *Carr v. Wallace Laundry Company*, 170 Pac. 107 (Idaho, 1918). An owner of premises has no duty to warn of open and obvious dangers of which an invitee knows or should have known. *Otts v. Brough*, 409 P.2d 95 (Idaho, 1965); *Ramon v. Interstate Utilities Company*, 170 Pac. 83 (Idaho, 1917). There is no question the power lines were an open and obvious hazard. They were in plain view. There is no evidence that Mr. Quedens did not know or should not have known of their existence and the danger.

CONCLUSION

Under no set of circumstances could the bank have any liability to the petitioner. There is no genuine issue of any fact material to the motion for summary judgment which the District Court granted and the Court of Appeals affirmed. On the facts and the law the bank was entitled to a dismissal. We respectfully urge the Court to deny the Petition for Writ of Certiorari.

Respectfully submitted,

MOFFATT, THOMAS, BARRETT & BLANTON
CHARTERED

By _____
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June 22, 1979